

**JUDICIAL DECISIONS**  
**ON THE**  
**WRIT OF HABEAS CORPUS**  
***AD SUBJICIENDUM,***

**AND ON THE**  
**PROVINCIAL ORDINANCE**

**2d Victoria, Chap. 4,**

**WHEREBY THE HABEAS CORPUS ORDINANCE OF 1784**  
**HAS BEEN SUSPENDED;**

**WITH NOTES.**



**THREE-RIVERS, FEBRUARY 1839.**

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

500 N. 5TH ST. NEW YORK, N. Y.

THE NEW YORK PUBLIC LIBRARY  
ASTOR LENOX TILDEN FOUNDATION  
500 N. 5TH ST. NEW YORK, N. Y.

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION  
500 N. 5TH ST. NEW YORK, N. Y.

THE NEW YORK PUBLIC LIBRARY  
ASTOR LENOX TILDEN FOUNDATION  
500 N. 5TH ST. NEW YORK, N. Y.

WITH NOTES

THE NEW YORK PUBLIC LIBRARY  
ASTOR LENOX TILDEN FOUNDATION  
500 N. 5TH ST. NEW YORK, N. Y.

THE NEW YORK PUBLIC LIBRARY  
ASTOR LENOX TILDEN FOUNDATION  
500 N. 5TH ST. NEW YORK, N. Y.

THREE RIVERS, 3d December, 1833.

On the Petition of Celestin Houde for a Writ of Habeas Corpus.

Mr. Justice Vallières de St. Real explained the grounds of his Judgment as follows :—

**I** SHOULD feel much regret in having to decide alone on the difficulties of this case, were it not that the same questions which have been learnedly treated before me were recently discussed by eminent Counsel, and adjudicated upon, after a full consideration, by a superior judicial authority in another District.

I am not in the habit of swearing *in verba magistri*: I know that the decision rendered elsewhere is not binding in this place, but good reasons are good everywhere, and truth is everywhere the same; and if I have drawn great resources from the labour of my colleagues at Quebec, it is because I have found it to abound in good reasons and important truths.

Celestin Houde, detained in the common jail of this District, under a warrant of commitment on suspicion of treason and treasonable practices and for seditious words, requires of me by his Petition, a writ of *Habeas Corpus ad Subjiciendum*. His Petition is presented by Mr. Turcotte, who has argued the cause of his client with as much ability as zeal. Mr. Vezina, of Counsel for the Queen, has exhibited the same zeal and ability in a discourse having for its object that the request of Celestin Houde should be rejected.

I am requested to issue a Writ of Habeas Corpus. This is a legal

remedy, the origin whereof blends itself with that of the common law, and which, like that law, is of such remote tradition, that its commencement cannot be shewn.

It is a remedy that has been confirmed, facilitated and made more efficient by several English statutes, namely, by the 16th Charles I, chap. 10, and particularly by the celebrated law of the 31st Charles II, chap. 2, a law which the English nation compare to their great charter, and emphatically call the *Habeas Corpus Act*.

Certain Writs of Habeas Corpus appertain to the Civil Jurisdiction, such are the writs characterized by the terms *ad faciendum et recipiendum*, *ad respondendum*, *ad satisfaciendum*, with which we have not to occupy ourselves.

The writ now asked of me is the Habeas Corpus *ad Subjiciendum*, a writ of high prerogative; the subject's writ of right, a recourse to the criminal jurisdiction.

It is a writ of high prerogative, for it must ever be the right of the sovereign to have the reasons explained to him, why any one of his subjects is deprived of his liberty, wheresoever it may be; and as the high prerogatives of the sovereign have as it were the same legal ubiquity as the sovereign himself, we must conclude hence that the Writ of *Habeas Corpus ad Subjiciendum* is a part of our public law, as are the writs of *Mandamus*, *Certiorari*, *Prohibition*, *Quo Warranto* and others of the same nature that are grounded solely on the royal prerogative.

The Writ of Habeas Corpus *ad Subjiciendum* is the Subjects' writ of right. Personal liberty is a natural right, inherent to every British subject. It is a right unalienable, such as a British subject can neither lose nor jeopardise otherwise than by committing some great crime, and of which he cannot be deprived otherwise than according to the express provisions of the law. Now a British subject carries this natural right, adhering to his person, into every part of the empire. It is the same at Quebec and in London, for this very reason, that it is the inheritance and birthright of every British subject; but, above all, this Writ of Habeas Corpus *ad Subjiciendum* is a recourse to the Criminal

jurisdiction. I have already observed that a British subject could not otherwise lose his liberty than by the commission of some great crime, and according to the precise dispositions of the law and one of the most beautiful features of the law of England is that clearness and precision with which it has defined the time, causes and extent of a legal imprisonment. Hence the necessity of stating in every warrant of commitment the causes that have led to it, in order that the Court upon a Habeas Corpus may judge of their validity, and may, according to circumstances, either discharge, or bail or remand the prisoner.

But what Court shall judge of the circumstances of a criminal accusation? It cannot be a Civil Court, which would be incompetent *ratione materiae*; it must be a Court of Criminal Jurisdiction: hence the fetters that impeded the jurisdiction of the Court of Common Pleas in this matter, anterior to the Statute 16 Charles I., chap. 10; for, of common right the Court of King's Bench, as holding the Pleas of the Crown, had alone the fullness of Jurisdiction upon a Habeas Corpus in criminal matters, and if by this statute the Court of Common Pleas has been placed upon the same footing as the Court of King's Bench in relation to the Habeas Corpus in criminal matters, the only inference that can be drawn from it is, that in order to facilitate the exercise of a right essentially vital, Parliament has invested the Court of Common Pleas with a criminal jurisdiction which it had not before, and it was unquestionably in the same view that the same jurisdiction was communicated by the statute 31 Charles II, chap. 2, to divers other civil authorities.

The Writ of Habeas Corpus demanded of me is considered as a Writ of Error, to obtain the revision by a superior tribunal, of the cause of imprisonment stated in the return, and in that point of view also the Writ of Habeas Corpus *ad Subjiciendum* is necessarily within the scope of criminal jurisdiction. It is the accessory of a criminal cause and this accessory is constantly of the same nature as its principal.

But if the Habeas Corpus in criminal matters be a recourse to the criminal jurisdiction, then of necessity, the common law which created it and the English Statutes by which it has been secured and improved, are parts of the criminal laws of England, and since the statute of the 14 George III, chap. 83, has given us those criminal laws to the exclu-

sion of all others, it must be granted that those parts of the common law of England which have imparted existence to the *Habeas Corpus* in criminal matters, and those English Statutes that have rendered it more beneficial and effective, particularly the statute 31 Charles II, chap. 2, have been established as laws in Canada by the statute 14 George III, chap. 83.

If this reasoning required confirmation, it would be found most complete in the Provincial Statute 52 George III, chap. 8, clause 7th, wherein it is enacted that the several regulations therein mentioned shall apply to all Writs of *Habeas Corpus* issued in virtue of the statute 31 Charles II, chap. 2, and under the Provincial Ordinance 24 George III, chap. 1.

But if the Legislature has precisely recognized in a public law that the English Statute 31 Charles II, chap. 2, may be the basis of a *Habeas Corpus* in this Province, what Judge, what Court, what Provincial Authority shall have the power to assert the contrary?

I have not the pretension of adding to the authority of an Act of the Legislature, but I cannot refrain from stating the fact that the Provincial Statute of 1812 was penned by a celebrated personage, equally eminent as a lawyer and as a Judge.

It is certain that the *Habeas Corpus* laws existed in Canada, even before the statute of 1774, as part of the criminal laws of England introduced by the Royal Proclamation of the 7th of October, 1763, and the certainty of which as well as their mildness and the benefits and advantages flowing from their execution had been sensibly felt by the inhabitants of the country from an experience of more than nine years, during which they had been uniformly administered. This is fully proved as well by the statute of 1774 as by the discussions and petitions which it occasioned, in several of which the men of a party complained that this Act of Parliament, by restoring the ancient laws of Canada for the decision of controversies in matters of property and civil rights, had virtually *abolished* the *Habeas Corpus* and given up the Canadians to the rule of *Lettres de Cachet* and arbitrary imprisonment; yet if we barely cast our eyes on the statute we shall be convinced that the British Parliament when it revoked the Proclamation of the 7th of

October, 1763, repealed the English criminal laws for a mere instant of reason, since it enacted that they should continue to be administered, to the exclusion of all others. But if the *Habeas Corpus* laws were part of the English criminal laws introduced by the Proclamation of the 7th of October, 1763, how can they not be comprised in the same criminal laws which are to continue to be administered in virtue of the statute of 1774? Are not the criminal laws of the proclamation and the criminal laws of the statute the same?

I say then, that the English Statute 31 Charles II, chap. 2, was introduced into this Province by the British Statute of 1774; I say that the common law of England, modified and improved by the several statutes relating to the Writ of *Habeas Corpus*, became the law of Canada by the same act of legislation; and that our Provincial Legislature has recognized the English *Habeas Corpus Act* as the law of this Province; and since there has been done nothing to repeal these fundamental laws of civil liberty in this Province, they exist at this moment in their full vigor, unless their suspension be the legal result of the ordinance passed by the Governor and Special Council on the 8th of November last.

The learned Counsel for the Queen produces this ordinance to me as a law, adverse to the claim of Celestin Houde and which I am bound to obey: the learned counsel for the prisoner, on the contrary, assures me that this ordinance has not suspended the *Habeas Corpus* introduced with the Criminal Laws of England by the statute of 1774, and moreover that I cannot obey this ordinance without violating an Act of Parliament, and he reads the statute 1 Victoria, chap. 9, as containing a clause that annuls the ordinance. Thus am I placed between the grave inconvenience of rejecting an ordinance, probably useful, perhaps necessary, of the Provincial authority, and the inconvenience at least as great of contravening an Act of the Imperial Parliament. In this perplexity as in all the intricate questions daily presenting themselves before the Judges, there are, happily, certain fixed principles which being applied give the light and lead to the truth. To ascertain precisely the extent of obedience, we need only find out the precise extent of authority, the one being necessarily the measure of the other—an authority without limits requires an obedience without bounds; but when the power is limited, its boundaries are also the bounds of obedience.

There are in every government a supreme authority and subordinate authorities.

The supreme authority of the empire of which we constitute a portion is Parliament which can do all things.

We may class amongst the subordinate authorities of this empire those Legislatures which have been established in several British Colonies and Provinces by divers Acts of Parliament, with powers defined and limited by those acts. Such subordinate Legislatures may do all that which does not exceed the boundaries given to their powers by the supreme authority, but beyond those limits they can do nothing. This applies to every limited authority. Thus, when a Judge or Tribunal has exceeded the bounds of its jurisdiction, the thing is very correctly said to have been done *coram non jndice* ; but the application of this rule is of urgent necessity when the subordinate authority is at the same time an exceptional one, *extra ordinem*, such as the existing Legislature of this Province, grounded upon the temporary suspension of the right which appertains to every British subject, to obey no other laws than such as he has constitutionally consented to.

Governed by those principles, a Judge finds in an Act of Parliament the reason and the rule of his decision : 'tis enough for him to understand, and he obeys it ; but in deciding upon the ordinance of a subordinate Legislature, the Judge has a double duty to perform : He must peruse the ordinance, to ascertain what it commands, and he cannot do otherwise than examine the act which constitutes the subordinate Legislature and the limits thereby given to its powers, for if it has exceeded those limits, whatever transcends them has been ordained without legislative power : but when the limited Legislature has confined itself within its limits then its ordinance is a law and must be obeyed.

Applying these rules to the present case, I have read with scrupulous attention the ordinance of the 2d Victoria chap. 4. I there find that the Provincial Ordinance 24 George III, chap. 1, which is our Provincial *Habeas Corpus Act*, is suspended until the 1st of June next, so far as relates to cases of *High Treason, Suspicion of High Treason, Misprision of High Treason and Treasonable Practices*.

I read also, and this in the first clause, that all persons committed by warrant for *High Treason, Suspicion of High Treason, Mispri-son of High Treason* or *Treasonable Practices*, shall be kept in safe custody without bail or mainprize during the continuance of this ordinance, and that during the same continuance, no Judge or Justice of the Peace shall bail or try any person so committed, without an order from the Governor with the advice of the Executive Council, any law, ordinance or statute to the contrary notwithstanding.

The suspension of the Provincial Ordinance 24 George III, ch. 1, seems to admit of no difficulty, and will not occupy us any more; but the learned counsel for the Petitioner argues, that notwithstanding that suspension and the terms of the first clause of the ordinance under consideration, his client cannot be deprived of the Writ of *Habeas Corpus* he prays for: according to his view, the statute 1 Victoria, chap. 9, has the effect of annulling that clause, which of itself enacts nothing directly against the *Habeas Corpus*: and in fact, the same third clause which confers at first upon the Governor and Special Council, the power to make laws and ordinances for the peace, welfare and good government of this Province, such as the Legislature of Lower Canada as then constituted, would be authorised to make, contains this amongst other restrictions, "it shall not be lawful, by such law or ordinance, to repeal, " suspend or alter any provision of any Act of the Parliament of Great Britain or of the Parliament of the United Kingdom or of any Act of " the Legislature of Lower Canada for repealing or altering any such " Act of Parliament."

The first clause of the Ordinance 2d Victoria chap. 4, does not directly suspend any provision of any Act of Parliament or of the Legislature of this Province, and would appear, at first sight, to be in nowise contrary to the restriction contained in the act which constitutes the Provincial Legislature now existing, but if the statute of 1774 has introduced into Canada all the laws of England, traditional and written in criminal matters: if the common law which has given existence to the *Habeas Corpus*: if the written laws, and namely the statute 31 Charles II, chap. 2, which have made it more beneficial and effective, are part of those criminal laws, then these laws, common and written, are as it were transcribed, and embodied in the statute of 1774; and

then, every legislative suspension of the rights and remedies awarded by that common law, and secured by those statutes or written laws, would be virtually, though indirectly, a suspension of a principal provision of the Act of the Parliament of Great Britain 14 George III. chap. 83, a suspension that would be null according to the terms of the constituting statute, 1 Victoria chap. 9. But it suffices in the present state of the case, to adjudge that notwithstanding the suspension of the Provincial Ordinance 24 George III. chap. 1, there are still existing in this Province, by force of the British statute of 1774, laws in virtue of which the subjects of the Queen, being deprived of their liberty on a criminal accusation, have a right to a revisal of the causes of their imprisonment, by Writ of *Habeas Corpus*; and this I do adjudge, after mature examination, saving the questions that may follow. For the Ordinance 2 Victoria, chap. 4, has only suspended the Ordinance 24 George III. chap. 1. It did not, nor could suspend the British statute of 1774, or the criminal laws of England which it has established in this Province.

Very loud cries have been uttered about the circumstances of the country, the danger of a collision between the Executive and Legislative authorities, and the Judicial powers has been painted in lively colours. We have been told that in times of rebellion the laws are dead, and the learned Counsel for the Queen has said, that the want of the state, that necessity, was the supreme law which every thing must obey.

I grant that the circumstances of the country are difficult, but let the law giver look to circumstances; the Judge looks to the law: and if rebellion has killed the law in another part of the province, it cannot be charged with the legicide in the District of Three-Rivers, for there has been no rebellion, no sedition, not the smallest popular commotion in this happy and peaceful part of the Province. To anticipate the collision spoken of by the learned Counsel for the Queen would be presuming against law, and I do not consider myself at liberty to entertain such a presumption. I assure myself that my judgment if erroneous, will be corrected by a legal authority superior to mine: and if it be not vacated in a judicial way, I make myself equally sure that it will receive it's execution, and will be respected by all the authorities of the country.

The greatest public good, the most pressing necessity in my opinion is, that we should respect the laws, even when they thwart our desires and resist our views: for laws are the common safeguard of governments and of nations, and there can exist no society or government without them.

The learned Counsel for the Queen, who has had the modesty of stating his arguments in the shape of doubts, lost nothing by it, for I on my part have considered his doubts as weighty objections. Upon one of them in particular I am anxious to satisfy him. I mean that which makes him fear that according to the terms of the Provincial Statute 34 George III. chap. 2, I, as judge of Three Rivers, should be disabled to grant a writ of *Habeas Corpus* in criminal matters. I think the fears of the learned Counsel will vanish if he will take the trouble to cast his eye on the Provincial Statute 10 and 11 George IV. chap. 22, clause 2, by which it is enacted, that the Resident Judge of the District of Three Rivers shall have and possess therein all the jurisdiction, powers, authority of which the Justices of the Courts of King's Bench of the Districts of Quebec and Montreal are invested in the said Districts respectively by any laws in force in this Province, and also all the powers, jurisdiction and authority which were then vested in the Provincial Judges of this District.

I am therefore of opinion that there exist in this Province *Habeas Corpus Laws* in criminal matters, which are inaccessible to the powers of the existing Provincial Legislature, and I hold that the Resident Judge has all the jurisdiction required to carry those laws into execution: therefore I grant to Celestin Houde the Writ of *Habeas Corpus* which he asks of me.



MONDAY, 7th January 1839.

**On Petition of Joseph Guillaume Barthe, for a Writ of Habeas Corpus.**

**Mr. Justice Rolland on giving Judgment, spoke as follows :—**

**ON** the Petition of Joseph Guillaume Barthe for a *Habeas Corpus* : his imprisonment being on a charge of treasonable practices.

Messrs. Vezina and Dumoulin, of Counsel for the Queen, have been heard : they have argued against the application, and grounded themselves on the Ordinance of the Administrator of Government and his Special Council, of the 8th November, chap. 4, which suspends the *Habeas Corpus*.

It would seem that this ordinance ought to put an end to the discussion, for it is formal, and forbids the Judges from bailing individuals accused as is the prisoner : but the prisoner's Counsel contend that notwithstanding this Ordinance and its injunctions, the Judge ought to award the *Habeas Corpus*, because the existing Legislature which is exceptional, has exceeded its powers, and that whatever it has done or ordered beyond its attributions is *ipso jure* null. That an Ordinance of a subordinate Legislature, to be valid, must be authorized by its charter, and that the existing Legislature was created merely as a temporary substitute, with very limited powers, for the Constitutional Legislature. It is therefore stated in opposition, that the Imperial Statute 1 Victoria, chap. 9, contains a proviso concluding in these words :—  
 “ nor shall it be lawful, by any such law or ordinance, to repeal, suspend or alter any provision of any Act of the Parliament of Great

" Britain or of the Parliament of the United Kingdom, or of any Act of the Legislature of Lower Canada, as now constituted, repealing or altering any such Act of Parliament," and that the Ordinance in question suspends the effect of an Act of the Imperial Parliament, by altering the Criminal Laws of the country, which can not be. Reference is made first to the Statute 31 Charles II. chap. 2, called the *Habeas Corpus* Act, and next to the Statute 14 George III. which, it is said, has introduced the Criminal Laws of England into this Country : those two acts, it is contended, are not nor can be repealed : they are still in full force : they allow the *Habeas Corpus* prayed for, which the Judge cannot refuse.

And here arise several important questions : and the first is mooted by the officer of the Crown, who maintains that the Judge cannot pronounce in opposition to this Ordinance, which is an Act of the acknowledged Legislature, the only one existing in the Province ; and that all it's Ordinances are law : that they must be obeyed though it were even true that the Legislature had exceeded it's powers and transcended it's attributions. If this proposition is true, all a Judge has to do is to read the Ordinance, to understand it's meaning and conform to it.

Without entering into a discussion of this question as if it concerned an Act of the Imperial Parliament of the supreme and sovereign Legislature, I ought to say in this place, that a Judge might, in certain cases, be called upon to examine whether the existing Legislature of Lower Canada, created by Act of Parliament, which might be compared to a Commission or Charter as was practised in the old English Colonies, (A.) authorising the Governor with a majority of a Council of not less than five members, to pass certain laws and no others, has exceeded it's powers. It is not the first time that English tribunals have adjudged in a similar case. The reason is very plain. There is a delegation of power from the sovereign Legislature, all that has been done by the delegate without being authorised, is *ipso jure* null. And to make the thing more palpable, and show that there is in this no anomaly, let us suppose the case of an Ordinance emanating from our present Legislature. In its preamble it rehearses as its authority, the Statute which created it. On referring to it we see that Her Majesty is thereby authorised to constitute, *by Commission*, a Special Council for the affairs of Lower Canada, with a majority of which it shall be lawful

for the Governor to make laws for the welfare and good government of the Province. As the Ordinance refers to the Imperial Statute, it is as if it were inserted word for word therein. Now we cannot omit the clauses that restrain the powers which it confers. Let us now suppose that this Ordinance should establish an impost absolutely prohibited, shall it be said that when the legality of this impost comes to be tried before a tribunal, the Judges must read no more of the ordinance than what it commands, without remarking that it refers to the Act of it's constitution which, as it prohibits the imposing of taxes, necessarily annuls whatever contravenes this prohibition? No: the proposition of the Counsel for the Crown is not founded on principle. There may be cases where the Judge could not refrain from declaring null an Ordinance or part of an Ordinance which evidently was without the power or attributions of the present local Legislature. But *certes*, to justify the Judge, the case must be of the utmost evidence; and then to judge thus is agreeable to law. He could not read the Ordinance without finding virtually recited in it, the Statute that created the Council, or without perceiving therein the limits given to that power, and beyond which it can do nothing. He could not but see that the Imperial Act declares null whatever shall be done contrary to its provisions; and he, the Judge, when he pronounces the nullity of the Ordinance, does no more than declare a nullity previously pronounced by the Imperial Statute, which to him is the supreme law.

But let us proceed; let us see whether such be the case; whether the Governor and his Council have fallen into this error; I have supposed, whether notwithstanding the prohibition of the Imperial Statute, by suspending the *Habeas Corpus*, they have suspended the effect of an Act of the Imperial Parliament. The question is delicate, and for a Judge in such a case to resolve against acknowledging the injunctions of an Ordinance, however subordinate the Legislature may be, it needs that he be very strong in his reasoning, and that he find in the Ordinance an infringement of the laws which he is bound to administer. I will therefore examine the question, referring first to the Statute 31 Charles II. chap. 2, and to judge rightly, it will be well to know what was this Statute; did it introduce *un droit nouveau*? Can it be considered as applicable to the Colonies of Great Britain?

The preamble shews that it did not introduce the *Habeas Corpus* which existed at common law. But it provides more effectually for the exercise of that right of the English subject which is essential for the protection of his liberties, and for the execution of the Writ of *Habeas Corpus* when it has been issued : it establishes rules for the Judges as well as for all other persons concerned, and also penalties in case of infringing it's provisions. This Act was passed in express terms for England and Wales.

In Canada, previous to the Statute of 1774, the subject might be entitled to the *Habeas Corpus* without it's being necessary to infer that the Statute 31 Charles II. chap. 2, was in force in the country, any more than the regulations and penalties which it established for England. And such is my opinion. (B.)

Let us now see whether this Statute 31 Charles II. chap. 2, was introduced into Canada by the Statute of 1774. This is the 11th clause which has been cited. It will be well to read it with attention in order to give it it's effect.

" And whereas the certainty and lenity of the criminal law of England, and the benefits and advantages resulting from the use of it  
 " have been sensibly felt by the inhabitants from an experience of more  
 " than nine years, during which it has been uniformly administered,  
 " Be it therefore enacted that the same shall continue to be administered, and shall be observed as law in the Province of Quebec, as  
 " well in the description and quality of the offence as in the method of  
 " prosecution and trial and the punishment and forfeitures, &c."

Certainly, the Statute 31 Charles II, chap. 2, is not introduced *nominatim*, but we are told it was virtually so, as being part of the criminal laws of England, when the statute (of 1774) was passed. The right of *Habeas Corpus* is not of criminal or of civil law, properly speaking ; it is the consequence of that protection which the laws afford an English subject for his personal liberty, which may be assailed by arrest for a crime or without any criminal charge whatever. (C.)

With respect to the Statute 31 Charles II, chap. 2, I shall say that, so far as it had relation to arrests for crime it formed part of the criminal laws of England. But the terms of the statute of 1774 which I have just cited do not appear to me sufficient for the introduction of all the statutes of England, which, like the *Habeas Corpus Act*, have a bearing towards criminal law. We must necessarily except such as are not susceptible of receiving their application in a Colony, and which evidently were passed for the Metropolis alone, to the exclusion of Colonies. And the clause is sufficiently explicit to prevent the supposing of any thing else. (D.)

Surely, one may conceive the introduction of the criminal law in the terms of that clause, without the introduction of what was qualified the *Habeas Corpus Act*, which has regulated for England the manner of using and enforcing the privilege of an English subject to be brought before the Judge in case of arrest for crime, and which in order to its becoming law in Canada, ought, it seems to me, to have been especially mentioned; and it ought even to have been said that it was introduced as far as it might be applicable. (E) If there be any doubt in the general proposition, the statute seems to resist our considering as introduced into Canada any more of the criminal law than what is formally mentioned in the clause, *qui dicit de uno negat de altero*. Moreover, it appears to me that the Legislature intended merely to continue the existence of the criminal laws, as they had prevailed in Canada since the Proclamation of 1763. Now the *Habeas Corpus Act* 31 Charles II, chap. 2, was not in force, but there was the right or privilege of this writ in virtue of the common law; this is the utmost that can be said. But what, if the statute is not susceptible of becoming law in Canada, if like many other statutes it was passed solely for England, and though it may be considered as forming part of the criminal law there, it cannot receive it's application elsewhere? See the clauses 3, 5, 10, 11 and 12. All those clauses are only applicable to England. It is on this account, no doubt, that it became necessary to pass a law in Canada, in imitation of the English statute, but the provisions whereof in regard of localities, are necessarily different. (F)

But it is said: suppose the statute 31 Charles II, chap. 2, is not the statute infringed upon by the ordinance; has it not transgressed the

statute of 1774 by suspending for a time the criminal laws introduced by that statute? This question is already answered. Can it be said that the suspending of the *Habeas Corpus* is a suspension of the code of English criminal laws conferred upon us? Does it imply any thing repugnant to the English criminal law such as we have it? Can the right of *Habeas Corpus* be conceived without there being joined to it a co-existing right in the Legislature of the country, of suspending it in certain cases, such as that of open rebellion? But it is added, whatever affects the criminal law, destroys the Imperial Act of 1774 by which it was introduced as a code into Canada. It may be said in answer that the statute did not introduce the criminal laws of England, but said they should continue to be in force. One might as well say that it introduced the civil laws, and that no change can be made therein without an infringement of the Imperial statute. I cannot persuade myself that in prohibiting the repeal, suspension or alteration the provisions of acts of the Imperial Parliament, it was intended to prevent all legislation on the subject either of the civil or of the criminal code of the country. (G).

Representations were made in England against the act of 1774, and whatever may have been the motives of those who made them, and the reasons, good or bad, given by them in relation to the *Habeas Corpus*, it would appear to have been the general opinion, in Canada as in England, that the *Habeas Corpus Act* was not in force. It is even mentioned that in the debates at the passing of the act of 1774, it was proposed to insert a clause for introducing the *Habeas Corpus*, but that it was rejected by the House of Commons, (this fact is of a nature to be substantiated) but I have no need of recurring thus far, and I take the ordinance of 1784. Does not this act of the legislation of the time explain itself on this subject? In a problematical question, I think myself much assisted when I have the opinion of the Legislature. This ordinance declares that its object is to introduce the *Habeas Corpus* which existed in England in virtue of the common law (which it says, is the right of every British subject in that Kingdom) such are its terms. It also explains itself in its preamble. We see that the Legislature is introducing *un droit nouveau*, a right which up to that time, England had been reluctant to allow, as we find was the case with the other English Colonies before that time. They had the common law of England, the criminal law of England, and they had not, according to the opinions of the Officers of the Crown, the law of *Habeas Corpus* or any corres-

pending law. It would seem then, that the one might exist without the other. (H) To pronounce the contrary, I must put my sense in opposition to the general opinion of that period, and wherefore? To find fault with an ordinance of the present time, which in itself, has nothing but what is useful, and to make which the Governor ought in my opinion to have been empowered, if in truth he has not by the Imperial Statute 1st Victoria.

It is therefore without difficulty that I adopt the opinion that the ordinance of 1784 is the *Habeas Corpus* law of this country. I proceed farther, and will say that we must consider it as such, because it was passed with the formal intention of introducing and regulating that right. What need have we to ascend any higher? Is it usual in case of a new code, to refer to any part of the old which is comprised in the new? After the ordinance of 1784, ought we to occupy ourselves with the statute 31 Charles II, chap. 2, or to cite it in any way? Well, this ordinance, the only one which in 1838 was the *Habeas Corpus* law in Canada, has been suspended; and it might be. How revive an old statute which, in my opinion, ceased to operate upon the passing of the ordinance which was substituted in its stead, if it was ever in force in the country, which is more than doubtful. (I)

This manner of looking at the subject is the more satisfactory to me as the legality of this year's ordinance happens not to be a question.

I will add another observation. How can it be conceived that the Governor and his Council should have a right to suspend the ordinance of 1784, and that by this means there would spring up an old statute as if purposely to defeat the wholesome purposes of the new ordinance? But this cannot be, for although the ordinance of 1784 be suspended, it is nevertheless a law, and an existing law, it disables us from considering the old law, the force of which it has destroyed by incorporating it within its own legislation. It cannot even be said that this is like the case of the Militia Act, which, by expiring, is said to have caused the revival of the old ordinances to which it had been substituted. (K) But I must not forget to mention the statute of 1812. This law recognizes the statute of Charles II, as in force in this country, for it directs that all the provisions of the act shall apply to all Writs of *Habeas Corpus* issued, as well in virtue of the Act 31 Charles II, as under the Provincial Ordinance of 1784. It is expressly said: one cannot deny it.

We are then at this day to pronounce that the Provincial Legislature in 1812 was in error, and certainly it is with plausibility that this declaration of the statute is relied upon as a rule for the interpretation of the statute of 1774. It is added that several Writs of *Habeas Corpus* have been awarded under the Imperial Act, which is an additional authority.

But we have a conflict of legislative authorities. The ordinance of 1784 gives clearly to understand that it introduces *un droit nouveau*. The statute of 1812 says that this was an unnecessary trouble, since we the benefit of the Act 31 Charles II, and last, an ordinance passed within these few days, tells us that that statute never was in force in this country. (L)

In such a case, a Judge must be free to form and follow his opinion, and I will abide by my first idea, which is that the statute Charles II, was never a law in this country. It ought also to be observed that the statute of 1812 only mentions it incidentally, as if to give the law it's effect in every possible case of *Habeas Corpus*. (M) My opinion, as is apparent, does not rest in any right in the Executive to silence the laws in time of rebellion. I cannot recognize that principle which has been relied on. It would, at most, apply to the case of the laws being silent of themselves, because they cannot be administered, and martial law is enforced, and this only in the case of necessity as when the tribunals are unable to act. I ought to say that I should not have arrived so promptly to the determination of refusing such a writ as the *Habeas Corpus*, particularly after the decisions which have been given on the same question, if I had not since its agitation seriously applied myself to it. The Judges who have given a contrary opinion did it with regret, and it could not but be so. More fortunate, I adjudicate in favour of a legislation, that of the suspension of the *Habeas Corpus*, in case of rebellion, which in many cases becomes absolutely necessary for the salvation of the state.

(Mr. Justice Rolland has revised and corrected this Translation of his Speech.)

(A.) In most Charters there was a restriction from making any law contrary or repugnant to the laws of England: in that of Canada in 1838 there is a proviso against passing any in opposition to any Act of the Imperial Parliament, see 2d vol. of Chalmer's opinion, p. 27, 28, 29, 30, 31.

## NOTES.

---

### (B.)

The Inhabitants of Canada were entitled to the *Habeas Corpus*, anterior to the year 1774, namely, in virtue of the English laws introduced by the Proclamation of the 7th of October 1763 : now the same Statute of 1774, while it *repealed* the Proclamation, *enacted* that the Criminal Laws of England should continue to be administered, whence it follows, that Lower Canada has had since 1774 the same Criminal laws, and consequently the same *Habeas Corpus* laws in Criminal matters, which it previously enjoyed under the Proclamation of 1763, and those Criminal and Habeas Corpus Laws, whether common or statutory, exist in this Province in virtue of the Statute of 1774, and cannot be suspended without suspending a provision of an Act of the Parliament of Great Britain, contrary to the Statute 1 Victoria, chap. 9.

### (C.)

The *Habeas Corpus* in civil matters belongs to the Civil as distinguished from the Criminal laws ; but the *Habeas Corpus ad Subjiciendum* is a criminal proceeding, and belongs to the Criminal law. My Lord Hale, P. C, vol ii. p. 145, after mentioning several Writs of *Habeas Corpus*, in matters Civil and Criminal, expresses himself thus : " *The other Writ is the Habeas Corpus ad Subjiciendum, which is for matters only of crime.*" See 1 Chitty's Criminal Law, 119.

(D.)

The Statute of 1774, by confirming the inhabitants of Canada in the enjoyment of the Criminal laws of England, has given force of law in this Province not only to the Common Law of England as it relates to Criminal matters, but also to all the Statutes of England which treat of the same matters.

Thus the provision in Magna Charta, "*that no free man shall be taken or imprisoned, or disseised of his freeholds or of his liberties or free customs, or be outlawed or exiled or otherwise destroyed: and that the King shall not condemn him or cause him to be condemned otherwise than by the lawful judgment of his peers and by the law of the land.*" This excellent law, though made expressly and exclusively for England, is at this day the law of Lower Canada, not by it's own force, but by the British Statute of 1774, made expressly and exclusively for Canada, and the same British Statute has introduced as laws in Canada the English Statute of 25 Edward III. defining the crime of treason, the Statute 5th Elizabeth against Perjury, the *Habeas Corpus* Act, the Riot Act, and volumes of other Criminal laws made exclusively for England, but now in full force in this Province.

If it be true (and it cannot be denied) that certain parts of the *Habeas Corpus* Act, 31 Charles II, chap, 2, and of other English Statutes in criminal matters cannot be executed in Canada, it must be conceded that those impossible parts are not binding; *impossibilium nulla est obligatio*; but the general principles established by those laws and all their practicable provisions are undoubtedly binding, for the Statute of 1774 has conferred upon Canada all the criminal laws of England, that is, all the criminal laws originally made for England alone to the exclusion of the Colonies, and whatever in those laws is not impossible is undeniably binding.

(E.)

If the *Habeas Corpus ad Subjiciendum* is a criminal proceeding, as cannot be doubted, if it formed part of the Criminal Law of England, as the learned Judge very truly says it did, it is difficult to conceive

how it could be otherwise than introduced into Canada by the Statute of 1774, which establishes the Criminal Laws of England to the exclusion of all others, as well in the description and quality of the offence as in the method of prosecution and trial and the punishment and forfeiture, that is to say, in every particular, in every thing. No ingenuity could point out any part of the Criminal Law not included in the Act of 1774.

## (F.)

If there could be imagined any part of the Criminal Laws not comprised in the terms of the Statute, there might be some reason to doubt, but those terms comprehend every branch, every detail of the Criminal Law, as well in their substance as in their outward forms, and the Statute has been uniformly and universally understood to comprehend the whole body of the Criminal laws of England, as they stood in England in 1774.

It is said the Act of 1774 did no more than continue the existence in Canada of the laws of England, as they had prevailed under the Proclamation of 1763; be it so; and then we must say that as the Proclamation had introduced the laws of England without restriction, so the Statute has continued the same laws, in criminal matters, also without restriction, in all their fulness, *qui dicit de omnibus dicit de singulis*.

The Statute *Circumspectè agatis*, 18 Edw. I. mentions the Bishop of Norwich only, *dicit de uno*: yet this Statute has always extended, by an equitable construction, to other Bishops, contrary to the false conclusion *negat de altero*.

The remedy given by Statute 9 Edw. III. chap. 3, against executors has always been equitably extended to administrators, contrary to the same supposed rule, but this trivial adage *qui dicit de uno negat de altero* is a false argument. It proves nothing, and ought to be banished from the forum as well as from the school if we wish to make law a reasonable science, 10 Toullicr, No. 302, page 433.

Several provisions of the *Habeas Corpus* Act, 31 Charles II. chap. 2, are inapplicable to Canada, but the *Habeas Corpus ad Sub-*

*Subjiciendum* itself is not only applicable, it is indispensably necessary to secure to the subject the *lenity* of the laws of England in the *method of prosecution* introduced in Criminal matters by the Statute 1774. The common law which created it, and the Statutes which have secured it; all this is applicable, and is consequently binding in virtue of the British Statute of 1774.

It was necessary to pass a law in Canada, not for introducing the *Habeas Corpus ad Subjiciendum*, the creature of the common law, but for regulating and securing the privilege thereof, as a law had been found necessary in England for the same purposes. A law was required in Canada, merely because the 3d, 5th, 10th, 11th and 12th Clauses of the English Habeas Corpus Act were inapplicable to the Province; but the other provisions of that law, its general spirit, the common law right of Habeas Corpus, all these things existed in Canada previous to the Ordinance 24 George III. chap. 1. Since the whole body of the English Criminal laws was enacted for this Province by the Act of 1774. The Common law of England is Statute law in Lower Canada.

(G.)

A suspension of the *Habeas Corpus*, introduced or established by a provision of the Statute of 1774, is in fact a suspension of that provision of the British Statute. It is also a suspension in part of that provision of the same Statute by which it is enacted that the Criminal laws of England shall be administered in the *method of prosecution*, for if a different method be adopted, as imprisonment in lieu of bail, where is the remedy without *Habeas Corpus*?

We may easily conceive the right to an *Habeas Corpus* or any other right established by the supreme Legislature of the empire, without any co-existing power in a subordinate Legislature to suspend such a right. Nay, one cannot understand such a co-existing power in the subordinate Legislature, without an express permission from the Sovereign Lawgiver: otherwise there would be two Legislatures equally supreme, which in one and the same state it is really difficult to conceive.

## (H.)

The Ordinance of 1784 did not introduce the *Habeas Corpus*. It gives no definition of it, and does not prescribe its form, but like the English *Habeas Corpus Act*, it treats of the *Habeas Corpus* as of a thing well known. It is true the preamble of the Ordinance recites certain Royal Instructions wherein it is suggested that the Legislature could not follow a better example than that which the common law of England hath set in the provision made for a Writ of *Habeas Corpus*, which is the right of every British subject in that kingdom. But the Instructions are barely recited as a fact: as the act of the Executive, not of the Legislature, and the very first clause of the ordinance departs from the Royal Instructions by *declaring* and enacting the privilege of *Habeas Corpus* in criminal matters, to the full extent of the *common and statute laws* of England, but nothing in the ordinance shews any intention in the Legislature to introduce the *Habeas Corpus*. The significant word *declared*, which governs the enacting clause is wont to indicate a different meaning.

The claim of the other English Colonies to the *Habeas Corpus Act* or other laws of *Habeas Corpus* depended, on general principles or on particular charters. Several of those colonies had been established, and a number of them had obtained their charters before the year 1679 when the *Habeas Corpus Act* was made, and could not avail themselves of the laws of England enacted since the date of their establishment or charters. Thus Ireland having received the laws of England in the 12th year of King John, the acts of the English Parliament made since that time did not extend to Ireland unless it were specially named: and accordingly the old rule of English law *nullum tempus occurrit regi*, still prevails in Ireland, though abolished in England by statute 9 George III, chap. 16, and by other statutes. In Canada the question is governed by the statute of 1774, which confers upon Canada all the criminal laws of England.

## (I.)

It is universally admitted that a prior law is repealed by a posterior and contrary enactment, *posteriores leges priores contrarias abrogant*; but it is equally evident that any number of laws enacted at different

times on the same subject may exist together if not contrary to each other. Hence the doctrine that all statutes *in pari materia* are to be read and construed as if they were one statute. Hence also the option allowed in many instances to proceed either on the statute or at common law. But if laws barely compatible may have a joint existence, what shall we say of two laws the latter of which is the complement and perfecting of the former? Such is the English Statute 31 Charles II, chap. 2, in relation to the common law of England; such the ordinance of 1784 with reference to the previous laws introduced by the statute of 1774. To say that those two enactments have repealed all previous *Habeas Corpus* laws, would be tantamount to maintaining that the perfecting has destroyed the very thing that was intended to be perfected.

## (K.)

The suspension of a law is the temporary repeal of that law, and it is not difficult to understand, that by the repeal (even for a time) of a repealing statute, the original statute is revived. But the ordinance of 1784 not having repealed the *Habeas Corpus* laws established in criminal matters by the act of 1774, its suspension can have no effect on those laws, which, as they existed anterior to the ordinance, have existed with it, now exist without it, and will exist with it when the suspension has expired.

## (L.)

There is no *conflictus legum* in the case. The Legislature of 1812, acting within the scope of its authority, has expressly admitted the English *Habeas Corpus* Act to be law in Lower Canada. The ordinance of 1784 contains nothing to the contrary but the bare recital in its preamble of certain Royal Instructions having nothing of a legislative character.

If we suppose the ordinance and the statute to be at variance, then the latter act of legislation would supersede the former; *posteriores leges priores contrarias abrogant*.

To cite a recent declaratory ordinance is to beg the question. The makers of that ordinance have no power to declare what they have no

power to enact, for the law does not permit that to be done indirectly which it does not allow to be done in a direct manner ; and the wise proviso of the statute 1 Victoria, chap. 9, would be quite powerless if the legislative power created by that act could annihilate by a declaratory ordinance those very acts of Parliament which it has not the power of suspending even for an instant.

(M.)

The intention of the Legislature was clearly to extend certain regulations of the statute of 1812 to every possible case of *Habeas Corpus*, but the statute contains an enumeration of those possible cases, and one of them is the issuing of a *Habeas Corpus* in virtue of the statute 31 Charles II, chap 2. It is therefore undeniable that a competent Legislature has adjudged the English *Habeas Corpus* Act to be the law of Lower Canada.